Supreme Court, U.S.
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No. 99-2019 (2)

In The

Supreme Court of the United States

JOSE LUIS ESCALERA, an individual,

Petitioner,

v.

TIERCO WATER PARK, INC., d/b/a WHITE WATER BAY THEME PARK; and PREMIER PARKS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Civil Appeals Of The State Of Oklahoma

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

DAVID B. DONCHIN, OBA #10783
Counsel of Record
J. LOGAN JOHNSON, OBA #12722
KATHERINE T. LOY, OBA #15358
DURBIN, LARIMORE & BIALICK
Attorneys for Respondents
920 North Harvey
Oklahoma City, OK 73102-2610
Telephone: (405) 235-9584
Facsimile: (405) 235-0551

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OR CALL COLLECT (402) 342-2831

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RESPONSE TO QUESTIONS RAISED FOR REVIEW

Petitioner has asked this Court to address two questions. The first is a general question apparently regarding the State of Oklahoma's regulations of marking the depths of public pools in feet which will be addressed later in this brief. The second question specifically requests that this Court determine whether the "Oklahoma court's ruling that defendants made the shallow pool into an open and obvious condition solely by marking it with a '3' " impermissibly classified the Petitioner according to his national origin. It must be noted that this is an inaccurate statement of the trial and appellate court's rulings in this action.

In this action, the trial court based its ruling of Summary Judgment for the Defendants not only on the fact that the Plaintiff stood by the "3" indicating that the pool was three feet for 45 seconds prior to diving in head first, but on other factors as well. The trial court stated:

> THE COURT: And then we get into whether it's open and obvious, whether there's a duty, whether there's an assumption of risk. I think that, as I've been through some of these, I think that some of the material facts that were represented on behalf of the plaintiff were sort of isolated statements taken out of the depositions but didn't really give me the clear picture because I think sometimes lawyers tend to pick out a statement that supports their particular position without giving me the context.
>
> And I do think in this case the plaintiff had been to similar water parks a few times. There is

RESPONSE TO QUESTIONS RAISED FOR REVIEW – Continued

some information that he had been to one at least in Tulsa. There's no doubt that there was a depth marker number on the pool edge. Whether the plaintiff being of Hispanic origin was confused by the number "3" as to whether it meant liters (sic) or feet of course is something you're relying upon heavily. Whether there's a duty on behalf of the water park to put the numeral "3" as a depth marker in languages and meters and other measurements to notify people from other countries seems to go beyond any requirements . . .

There's no doubt that the plaintiff could see others in the catch pool at the time that he dove, although there certainly seems to be an agreement that he couldn't see the bottom of the pool at the time he dove. He did see others exiting the pool or floating around on inner tubes. The water apparently was turbid at that point. There were rails and some steps leading out of the water, I believe, from which a reasonable person might be able to gather information as to the depth of the water.

Plaintiff knew and admitted that he knew he could be injured by diving into water of an unknown depth. I guess I'm inclined to rule in favor of the Defendant's Motion for Summary Judgment because of the things I've just mentioned in addition to what they have set out in their brief, that there was an open and obvious situation here. The plaintiff assumed the risk by diving head first into water where he could not see the bottom . . .

RESPONSE TO QUESTIONS RAISED FOR REVIEW – Continued

(Petitioner's appendix B – 8a). The trial court also noted:

> THE COURT: I thought it was also interesting that this plaintiff used in reference to distances the term "number of feet" ***and never used meters when he was describing other things,*** so be that as it may . . .

(Petitioner's appendix B – 20a).

The Oklahoma Court of Civil Appeals, although it did focus primarily on the presence of the "3" marking on the side of the pool and did not mention many of the other factors present making the depth open and obvious, did not base its determination solely on the presence of the "3" marking at the side of the catch pool, but additionally on the basis that the Plaintiff should not have assumed the depth of the pool without further testing. It held:

> He (Plaintiff) testified the metric system of measurement is used in Mexico, where he was raised. Thus, he contends that because he was raised in Mexico, a jury may find he reasonably assumed the depth of the catch pool was 3 meters, rather than 3 feet. We disagree. ***Inasmuch as Plaintiff has lived in the United States for the past 12 years, a reasonable person exercising fair and impartial judgment could not reach the conclusion the depth of the catch pool was 3 meters rather than 3 feet without further testing.***

(Petitioner's Appendix – Exhibit A).

RESPONSE TO QUESTIONS RAISED FOR REVIEW – Continued

From the above, it is clear that the statement that the Oklahoma court's opinions were based solely on the "3" marking is inaccurate at best. As such, Petitioner's second question is without merit.

RESPONSE TO PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, Respondents Tierco Water Park, Inc., d/b/a White Water Bay Theme Park; and Premier Parks, Inc. state that they have no parent corporations, nor is there any publicly held company that owns 10% or more of either of their stock.

TABLE OF CONTENTS

Page

RESPONSE TO QUESTIONS RAISED FOR REVIEW .. i

RESPONSE TO PARTIES TO THE PROCEEDING... v

RESPONSE TO STATEMENT OF JURISDICTION ... 1

RESPONSE TO STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED..... 3

RESPONSE TO STATEMENT OF THE CASE 4

RESPONSE TO PURPORTED REASONS FOR GRANTING A WRIT..... 8

I.

CONTRARY TO PETITIONER'S ASSERTION, THE FEDERAL STATUTE STATING THAT THE METRIC SYSTEM IS PREFERRED FOR UNITED STATES TRADE AND COMMERCE CREATES NO OBLIGATIONS ON THE STATE OF OKLAHOMA, NOR DOES IT REQUIRE OR MANDATE THAT THE METRIC SYSTEM MUST BE USED FOR ALL PURPOSES..... 8

II.

THE JUDGMENT AWARDED TO DEFENDANTS DID NOT IMPERMISSIBLY CLASSIFY PETITIONER IN ANY MANNER..... 13

III.

PETITIONER SHOULD BE SANCTIONED FOR FILING A FRIVOLOUS PETITION FOR WRIT OF CERTIORARI..... 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Robertson, 520 U.S. 83 (1997) 2

People v. Choi, 167 Cal.App.3d Supp.6 (1985) 11, 12

STATUTES:

15 U.S.C.A. § 205(b) 11

28 U.S.C. § 1257 ..... 1, 2, 16

28 U.S.C. § 1257(a) 1

RULE:

Rule 29.6 v

Supreme Court Rule 14(g)(i) 4

Supreme Court Rule 33 10

Supreme Court Rule 42 16

Supreme Court Rule 42(2) 15

OTHER AUTHORITIES:

The Metric Conversion Act 1, 2, 3, 10, 12, 16

RESPONSE TO STATEMENT OF JURISDICTION

Petitioner contends that this Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1257(a) which provides that final judgments rendered by the highest court of a State may be reviewed by this Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn into question, or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. No jurisdiction exists in this case for two reasons. First, none of the issues required under 28 U.S.C. § 1257 truly exist in this case. Second, Petitioner did not even attempt to raise such an issue in the Oklahoma state courts. As such, he is precluded from raising such an issue in the United States Supreme Court.

Petitioner contends that the jurisdictional requirements of the statute are satisfied because he has been "denied his right to the equal protection of the laws and to his rights under the federal Metric Conversion Act of 1975 as amended in 1988 in violation of the protections guaranteed by the United States Constitution". A review of the underlying action and the proceedings therein makes clear it was nothing but a simple premises liability negligence case based in Oklahoma state common law. Summary Judgment was sustained because the premises condition of which Petitioner complained, the depth of the pool, was open and obvious based on all of the surrounding circumstances. No equal protection issue

exists. Further, The Metric Conversion Act creates no individual rights. Finally, by no means was the validity of any Federal statute or treaty at issue, nor was there any issue regarding whether any state statute existed which was repugnant to Federal law in the underlying case. As such, no jurisdiction exists.

Moreover, even if such an issue could be said to exist, Petitioner is precluded from raising such an issue at this time. In reviewing state court judgments under 28 U.S.C. § 1257, the United States Supreme Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the judgment. *Adams v. Robertson*, 520 U.S. 83 (1997). A review of the briefs, transcripts, and opinions in the state courts shows that Petitioner never once asserted any Federal question in the state courts. Not once did he argue that his rights under the United States Constitution were being violated. Not once did he argue that to find the premises condition open and obvious would violate his Federal rights of equal protection. Not once did he claim that the Oklahoma State regulation stating that pools must be marked in numbers only violated Federal law. In fact, rather than arguing the regulation was invalid, he attempted to use the regulation to his favor. No Federal issue was ever presented to the state courts by Petitioner, much less addressed by the Oklahoma state courts.

As Petitioner was unsuccessful in all of the state courts, he is now trying to create new theories and arguments based in Federal law to get his case in front of this Court. This is improper. Jurisdiction for this Court to hear this action does not exist as Plaintiff raised no Federal

Questions at the state court level. As such, the Petition for Writ of Certiorari must be denied.

RESPONSE TO STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions cited by Petitioner have no application to the facts of this simple premises liability negligence case, nor were they ever mentioned or quoted during any of the state court proceedings. The Metric Conversion Act was cited by Petitioner in the lower courts ***solely*** for the purpose of stating that the United States had adopted the metric system as the ***preferred*** system of weights and measurements. No argument was made that the Act created any individual rights or ***required*** the metric system to be used exclusively. A review of the portions of the Act set out by Petitioner irrefutably shows that they create no standard or requirement which would be applicable in this case.

The state regulation cited by Petitioner was at issue in this case. Petitioner himself raised the regulation as an issue and maintained that Defendant had not acted in conformance with the regulation. Respondent maintained that it was in full compliance with the statute. Although at the state court level Petitioner attempted to use the regulation affirmatively, he now argues to this Court that the regulation itself violates his Federal rights. This argument is clearly without merit.

RESPONSE TO STATEMENT OF THE CASE

Most telling in Petitioner's Statement of the Case, is that he completely ignores Supreme Court Rule 14(g)(i) which requires that he specify at what stage in the proceeding in the court of first instance and the state appellate courts that he raised the Federal questions of which he now seeks review, the method or manner of raising them, and the way in which they were passed on by the state courts. Petitioner has ignored this provision because he cannot satisfy the provision. At no time in the state courts did he raise the purported Federal issues he now asks this Court to review. No Federal question was timely or appropriately raised; therefore, this Court has no jurisdiction to review the judgment on a Writ of Certiorari.

Further, Petitioner's "Statement of Facts" is nothing more than one large misstatement of fact. It inaccurately states the facts of the case and the actions, basis for rulings, and rulings of the Oklahoma courts. The "Statement of Fact" contains no true facts, but only distorted perceptions, conclusions, and arguments by Petitioner.

Aside from the inaccurate rendition of the underlying facts of the case, Petitioner's statements of the rulings of the Oklahoma courts appear to be almost entirely based on fiction. Petitioner's statement that the Oklahoma court refused to allowed him to establish certain facts is untrue. Petitioner had ample opportunity to include all relevant arguments and materials in his briefs and was given the opportunity for oral argument in the trial court.

Even more untrue and absurd is the Petitioner's statement that the Oklahoma courts based their rulings

"on the 'state policy' that all measurements are understood to be in feet, state regulations requiring pool depth signs to be in 'feet', and judicial notice that persons who remain in Oklahoma are, as matter of law, obliged to abide by that state's disregard for the federally mandated preference for metric measurements." The statement is nothing more than a creation by Petitioner of rulings and determinations which never existed for the purpose of trying to get this Court's attention. There was never any mention of "state policy" regarding measurements in the Oklahoma State courts and the Court did not take "judicial notice" of any fact. This statement by Petitioner is not based in fact or the underlying record in any manner.

Likewise, Petitioner's statement that the Oklahoma Regulations for public bathing facilities were construed by the Oklahoma Courts to "charge all persons who are in Oklahoma with knowledge that the federal policy favoring the use of the metric system throughout the United States is suspended in that state" also has no basis in the record or fact. Further, it must be noted that "preferred" does not mean required or mandated. Finally, Petitioner's last statement that the Oklahoma court "ruled that all persons in that state must be aware that all pool measurement signs in Oklahoma are permitted to display the depth of the water only in feet" is also wholly unsupported anywhere in the record and no such ruling was made.

This is truly a basic and simple premises liability negligence case which irrefutably involved an open and obvious condition entitling Defendants to Summary Judgment under Oklahoma law, as properly awarded by the trial court and affirmed by the Oklahoma appellate

courts. Plaintiff, a 29-year-old man, dove head first into a three foot catch pool (pool at the bottom of a group of slides which "catches" people coming off the slides) at White Water Bay, an Oklahoma City water park. Plaintiff admits that he saw the "3" depth marking on the apron of the pool and stood by the marking for 45 seconds before diving. The depth marking is fully in compliance with the requirement for such markings under Oklahoma regulations. Signage for the slides instructs riders to exit the catch pool quickly after coming down the slide. Petitioner did not ride the slides; rather, intoxicated at the time, he walked up to the side and then dove head first into the 3 foot catch pool.

Despite the fact Plaintiff saw the number "3" and states he could not see the bottom of the pool, he dove head first into the pool. Notably, although Plaintiff claims that because he was Mexican and Mexico uses the metric system the marking was unclear and he believed it referred to meters, throughout his deposition when asked measurements he testified using terms of ***feet*** except when asked questions specifically regarding the depth of the catch pool itself. Further, Plaintiff had lived in the United States since 1986, and had admittedly been in at least one other pool which was marked in feet. Notably, when questioned about the depth of water in the swimming pool at his apartments, Plaintiff testified:

Q. Okay. How deep was that pool?

A. In one end, it would have about *three feet* and in the other one it was about *eight feet*.

Q. Okay. Would you dive in where it was eight feet deep? Is that the end you would dive in?

A. Yes, sir.

Q. Okay. You did not dive in the three foot area, did you?

A. No, sir.

Even more damaging to the Plaintiff's contentions is the fact that when questioned how far he was standing from the edge of the catch pool when he observed the "3" and before diving in and sustaining his injuries, Plaintiff testified:

Q. Alright. And when you stopped for that 45 seconds, how much distance was there between you and the edge of the pool?

A. Maybe *two feet*.

Further, it was incontrovertible from Plaintiff's testimony that he saw others exit the pool and that he fully understood that he could be seriously injured by diving into water of an unknown depth. Additionally, numerous color photographs were provided to the trial court and Oklahoma appellate courts which clearly showed the pool was obviously for the purpose of catching people coming off of the slide, and that the rails and steps (and obviously the number three around the edges) clearly indicated to any observer that the pool was shallow. While the incident was unfortunate, it was clearly and indisputably the fault of the Plaintiff himself, and not due to any act of negligence by the Defendants. The depth of the pool was irrefutably an open and obvious condition. Based on all of these factors (See: trial court's statements quoted above), the Oklahoma trial court awarded Summary Judgment to the Defendants. This ruling was

affirmed by the Oklahoma appellate court. The Judgments in favor of Defendants by both the trial court and the Oklahoma Appellate Courts were proper. The determinations of the Oklahoma Courts were in no way in contravention of Federal law, nor did any Federal issue even exist. As such, the Petition for Writ of Certiorari should be denied.

RESPONSE TO PURPORTED REASONS FOR GRANTING A WRIT

I.

CONTRARY TO PETITIONER'S ASSERTION, THE FEDERAL STATUTE STATING THAT THE METRIC SYSTEM IS PREFERRED FOR UNITED STATES TRADE AND COMMERCE CREATES NO OBLIGATIONS ON THE STATE OF OKLAHOMA, NOR DOES IT REQUIRE OR MANDATE THAT THE METRIC SYSTEM MUST BE USED FOR ALL PURPOSES.

As set out above, Petitioner's statements regarding the Oklahoma Courts' rulings in this case are wholly inaccurate. The overwhelming and incontrovertible evidence showed that the depth of the pool was an open and obvious condition. Based on this evidence, the Oklahoma Courts granted Summary Judgment for Defendants. The Oklahoma Courts in no way ruled "that even though Petitioner was raised in Mexico, where measurements of pool depths and similar labels are always in meters, the jury was not permitted to consider whether he reasonably believed that the "3" on the sign meant three meters rather than three feet" as contended by Plaintiff, nor were the Oklahoma courts' rulings based solely on the fact that

Plaintiff had lived in the United States for the past 12 years, although the appellate court did make mention of such fact. Further, the Oklahoma Courts took no "judicial notice that a foreign national from a country that uses the metric system . . . was barred from proving . . . his reasonable understanding that the pool was actually three meters deep" or that "the preferred system of measurement in this country if feet and not meters" as is repeatedly stated by Petitioner. In fact, he was allowed to make an attempt to prove such a case, but the Court ruled: a) it was not a reasonable position; b) it was unsupported by law; and c) the entire fact situation did not support such a case. Petitioner is at best inferring and attributing rulings to the Oklahoma courts which did not exist, and at worst wholly fabricating rulings to get this Court's attention. The judgments of the Oklahoma Courts were proper and no reason exists to overturn such judgments.

Even if the Oklahoma Courts had based their opinion solely on the fact that the pool was clearly marked with the number "3", that the Plaintiff admittedly had seen that "3", and that the "3" was wholly in accord with the Oklahoma Regulations regarding the marking of pools in feet, there would be no basis for this Court's review. Petitioner contends that the state of Oklahoma has violated Federal Supremacy by requiring that pools be marked in terms of feet, rather than using the metric system. This contention is absolutely absurd. There is no Federal mandate which requires the use of the metric system for all purposes throughout the United States.

One does not have to look far in the United States to see that the metric system is not used for all, or even the

majority of, purposes. Speed limit signs and distances are marked in miles per hour; road construction is marked in terms of how many feet ahead it is; gasoline is sold in gallons; football fields and golf courses are marked in terms of yards; home runs in baseball are measured in feet; height and weight is measured and spoke of in terms of feet, inches, and pounds; and meat and fruit are sold by the pound, just to name a few instances where the metric system is not used. This Court's own rules on brief formats are set forth in terms of inches, not centimeters. (See Supreme Court Rule 33). It is irrefutable that while the metric system may be "preferred" it is only in limited use. Further, any reasonable person who has been in the United States for any length of time must be well aware that the metric system is not exclusively used. If Plaintiff's theory were to be taken as true, no one could ever be held liable for speeding under the current common road marking signs. The standard signs generally do not contain an indication that they are for miles per hour, they merely state "SPEED LIMIT 55" or whatever the limit for the particular roadway. As such, under Plaintiff's theory, all an individual should have to do to get out of a speeding ticket would be to say, "I thought it meant kilometers". Obviously, the Court system would not put credence in such a contention.

The fact that the Oklahoma Health and Safety Regulations require that pools be marked in feet, and by numeral only, is in no way in contravention of any Federal laws or in violation of the Supremacy Clause of the Constitution. The Federal Metric Conversion Act does not impose any obligation or requirements on the states. It merely provides that the metric system is the ***preferred***

system of weights and measures ***for United States trade and commerce.*** 15 U.S.C.A. § 205(b). It places no requirements on the states, but merely requires that ***Federal agencies*** use the metric system in their business related activities unless impractical. *Id.* ***Further and most importantly, it specifically provides that the continued use of traditional systems of weights is permitted in non-business activities.*** *Id.* This provision alone obliterates the Petitioner's entire argument in this case.

Petitioner contends that Oklahoma violates this act by requiring that pools be marked in terms of feet. First, irrefutably there is an enormous distinction between the terms "preferred" and "mandated". Obviously, as the statute merely states a preference, Oklahoma's regulation cannot "contravene" the Act as contended by Petitioner. Further, it is clear that the marking of a swimming pool is not "United States trade and commerce". As such, the preference would not even be applicable. The depth marking of a pool is not a commerce activity, it is a non-business activity. The pool is not going to be sold based on such marking. As such, regarding such markings, ***the Act itself specifically allows for the continued use of the traditional system of weight, which would include measurements in terms of feet.*** Petitioner's argument that Oklahoma has somehow acted in disregard and contrary to the act is without merit and entirely frivolous.

Interestingly, Petitioner cites *People v. Choi*, 167 Cal.App.3d Supp.6 (1985), a case directly contrary to his position. In *Choi*, at issue was whether a California requirement that any gasoline retailer pricing its gas by liter instead of by the non-metric gallon could be required by law to post a table converting the price to its non-

metric gallon equivalent. The defendant, who had been convicted of not doing so, contended that the requirement violated the Federal Metric Conversion Act, making almost the same arguments that Petitioner attempts to make in this case. The Court rejected those arguments.

The Court held that there was not evidence of either a Congressional intent to completely occupy the field of weights and measures or of any conflict between the statute and Federal law and policy. *Id.* The Court held that Congress by the Act had encouraged the metric system, but had not mandated the adoption of the metric system by the states. The court noted that the legislative history of the Federal statutes indicates that Congress believed the international metric system should be the dominant, but certainly not the exclusive system of measurements in the states. Further, Congress intended the eventual adoption of the metric system to be entirely voluntary, and it is apparent that it envisioned the alternative use of non-metric weights and measures by individual states. *Id.* As such, the Court held that state laws regulating weights and measures were not invalid, did not conflict with any Federal law, and did not obstruct the implementation of congressional policy. *Id.*

Unlike this case, *Choi* specifically involved commerce and trade. Even so, it was recognized that the Federal Metric Conversion Act does not mandate that States use the metric system, even in commerce. Plaintiff's contention that Certiorari should be granted to resolve a conflict among the states in "their approaches to implementing the Metric Conversion Act of 1975" and to denounce "Oklahoma's deliberate flouting of the federal statute

that requires adoption of the metric system" which Petitioner contends violated his Federal rights is simply preposterous. Oklahoma violates no Federal law by requiring that pools be marked in feet. The Petition for Certiorari is so outlandish that Respondents respectfully request that pursuant to Supreme Court Rule 42 this Court award Respondents damages for having to respond to the frivolous petition.

II.

THE JUDGMENT AWARDED TO DEFENDANTS DID NOT IMPERMISSIBLY CLASSIFY PETITIONER IN ANY MANNER.

The judgment of the Oklahoma courts in this action was in no way discriminatory, nor did it improperly classify the Petitioner according to his national origin. This contention by Petitioner is wholly without merit and frivolous. As set out above, this action was a simple premises liability negligence action. The catch pool at issue was marked in accordance and compliance with Oklahoma regulations, requiring that the depth of pools be marked in numerals only, such numerals representing feet. There was simply no evidence that Defendants were negligent in their marking of the pool. Further, photographs and other indisputable evidence clearly showed that the depth of the pool was an open and obvious condition. As such, the Oklahoma Courts granted judgment to Defendants.

Plaintiff's foreign status was in no way used to deprive him of any rights, nor was he in any manner

classified according to his national origin. Again, if Plaintiff's contentions were taken as true, no individual raised in a foreign country could ever get a speeding ticket in the United States. All the individual would have to state to avoid such ticket would be that he thought the number was in kilometers. This obviously would not be condoned by the courts.

Although not the basis for the Oklahoma Court rulings, it is significant that this is not the case where the Petitioner had been in the country a limited amount of time, such as a day or two, and had never been subjected to any system other than the metric system or where he had no understanding of measurement in non-metric terms. Petitioner had lived in the United States for 12 years prior to his accident. As such, he undoubtedly saw things in non-metric measures on a daily basis. If he left his home and went down a public road, he saw speed limit and most likely road construction signs. If he went to the grocery store, he saw fruit, vegetables and meat for sale by the pound. If he watched sports at all, he saw distances in non-metric terms. Further, during his deposition, Petitioner testified to all measurements in terms of feet except when questioned specifically regarding the depth of the catch pool in which his injury occurred. As such, any contention that he had no comprehension of non-metric terms would be ludicrous. It would not be unreasonable to hold that such a person could not reasonably assume that a numeral in the United States denoting size, weight, or depth, was either metric *or* non-metric without further investigation. It is clear that this is not a case where Petitioner is being discriminated against because of his nationality, but rather one where Petitioner

is trying to hide behind his nationality to get special and unwarranted protection.

The contention that Petitioner was discriminated against because of his national origin, or that the Oklahoma Courts' rulings deprived him of equal protection of the laws is without merit and frivolous. The Oklahoma Court rulings were irrefutably proper under the indisputable facts of the case. The photographs of the pool alone, without regard to the depth marking, showed that the depth of the pool was an open and obvious condition. The photographs alone would have required judgment for Defendants under Oklahoma law. Further, no evidence of negligence by the Defendants existed, another clear and proper ground for Summary Judgment. No Federal issue existed in the Oklahoma courts, much less was any Federal law or standard violated by the Oklahoma courts. As such the Petition for Writ of Certiorari should be denied.

III.

PETITIONER SHOULD BE SANCTIONED FOR FILING A FRIVOLOUS PETITION FOR WRIT OF CERTIORARI.

Supreme Court Rule 42(2) provides that when a Petition for a Writ of Certiorari is frivolous, this Court may award the respondent just damages. As set out above, the Petition for Writ of Certiorari filed in this action is unquestionably frivolous. It raises issues that were never raised in the state courts; therefore, they cannot now be properly presented for review. Further, a review of the

issues raised themselves shows that they are wholly without merit and not based in law or fact. As such, sanctions pursuant to Supreme Court Rule 42 are warranted in this case.

The damages incurred by Respondent would be the attorneys' fees incurred in responding to the Writ of Certiorari and additionally the costs of printing the Objection to Petition for Writ of Certiorari. Respondent requests that this Court award it such damages due to the frivolous filing of the Petitioner.

CONCLUSION

No valid reason exists for this Court to grant a Writ of Certiorari in this case. First, none of the issues the Petitioner raises here were properly presented, much less, addressed by the Oklahoma state courts. As such, jurisdiction under 28 U.S.C. § 1257 does not exist. Second, even if such jurisdiction were present, no valid issue for this Court's determination exists. The Federal Metric Conversion Act created no requirement or prohibition against a state regulating that any item, particularly a non-trade item, be marked in non-metric terms. Any contention to the contrary would ignore the wording and provisions of the Act itself. The contention that Petitioner was discriminated against and denied equal protection due to his national origin also has no basis in the facts present or law applicable in this case. Based on the

foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

DURBIN, LARIMORE & BIALICK
DAVID B. DONCHIN, OBA #10783
J. LOGAN JOHNSON, OBA #12722
KATHERINE TAYLOR LOY, OBA #15358
920 North Harvey
Oklahoma City, OK 73102-2610
Telephone: (405) 235-9584
Facsimile: (405) 235-0551
Attorneys for Respondents Tierco Water Park, Inc., d/b/a White Water Bay Theme Park, and Premier Parks, Inc.